

**A New Castle City Board of Adjustment Hearing took place on March 27, 2013 at 7 p.m. in the City of New Castle's Town Hall.**

Present: Donald A. Reese, Mayor  
Daniel R. Losco, City Solicitor  
David J. Athey, City Engineer

City Personnel: Jeff Bergstrom, City Code Official

Mayor Reese called the meeting to order at 7 p.m. Roll call was taken.

Mayor Reese read the Notice of Public Hearing that states, "An application has been filed by John W. Cochran, 59 The Strand, New Castle, DE 19720 for a property located at 807 Washington Avenue, New Castle, Delaware, parcel number 21-014.00-241, seeking variances from the Code as follows: (1) minimum building side yard (both) setback requirement of a minimum of 15 feet for a multi-family building to permit an existing building side yard setback of 2.7 feet; (2) minimum building side yard (single) setback requirement minimum of 56 feet for a multi-family building to permit an existing building side yard setback of 2.7 feet; (3) minimum building side yard (both) setback requirement of a minimum of 15 feet for a multi-family building to permit an existing building side yard setback of 3.1 feet; (4) minimum building side yard (single) setback requirement minimum of 5 feet for a multi-family building to permit an existing building side yard setback of 3.1 feet; (5) minimum building rear yard setback requirement of a minimum of 25 feet for a multi-family building to permit an existing building rear yard setback of 0.8 feet.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Wednesday, March 27, 2013, at 7 p.m. in Old Town Hall, 2<sup>nd</sup> Floor, located at 2<sup>nd</sup> and Delaware Streets, New Castle, Delaware."

An affidavit of publication was published in the News Journal and the New Castle Weekly.

Shawn Tucker, counsel for Mr. Cochran, presented. He was joined by Mark Ziegler who is a civil engineer with McBride and Ziegler. (*Mr. Ziegler was sworn in by Mr. Losco.*)

Housekeeping matters – the zoning classification on the application is identified as non-conforming commercial and the zoning designation is R-3. Since the application was filed the number of variances can be decreased from five to three. The size of the variances has also been reduced. A list of the variances now being sought was distributed. Mr. Tucker will seek to amend the original application.

Mr. Tucker briefed the Board on the application. He said the property is used for office/commercial use. Mr. Cochran operates his plumbing business from the building. It is an existing non-conforming use. Prior to this time the property was zoned R-3. This application (3 variances) would permit the applicant to establish 5 multi-family residential units on the site. To do this there are 3 setback problems given the current building configuration. (Survey dated 9/23/05 was distributed and shows the building configuration.) If the variances were approved the applicant could install 5 multi-family units in place of the existing non-conforming office/commercial space. The units would be located in the 2-story block and frame and the top floor of the southern 2 story block and frame. The business would remain as an existing non-conforming use.

Mr. Cochran said the 3-story brick frame building contains 2 residential units and the first floor houses his business. (*A brief recess was called.*)

Mr. Tucker indicated a mistake was made in the type of uses in the 3 story brick frame building. New bulk area calculations have been done. As a result the applicant is requesting the addition of 4 new units rather than 5 units.

Three new units would be located in the building to the south; 1 unit will be in the rear of the 3-story building. When complete there would be a total of 6 units; the 4 new units plus the 2 existing units.

For purposes of this hearing, building 1 is described as the 2-story block and frame building to the south; building 2 is the 2-story block and frame building to the north; building 3 is the 3-story brick and frame building.

Mr. Tucker described the specific variances being requested. He is seeking a total of 3 variances regarding side yard setbacks for the 2-story building to the south and the 2-story building to the rear and a rear yard setback variance for the 2-story building to the rear. Variance 1 applies to building 1 and would seek a variance from the side yard setback requirement for the building to the south from 12 feet to 2.7 feet. The building footprint would not change. The height of the building is less than 14 feet.

Variance 2 seeks a variance from the 7 foot side yard setback requirement to 3.1 feet on building 2. Variance 3 seeks a variance from the 25 foot rear yard setback requirement to 0.8 feet and also applies to building 2.

With regard to the first and second setback variance, there was discussion about interpretation between the table and the Code. Mr. Athey argued that setbacks go with parcel lines and not buildings, but the same variance is being sought and the notice is advertised properly. Mr. Athey also argued that the building height should be used as the bases for the setbacks. (*Discussion followed.*)

**Mr. Losco made a motion to accept the applicant's request to amend the variance application to reduce the number of variances to 3 as described on the handout provided.**

**Variance 1 – from the minimum side yard setback requirement of 15 feet for the multi-family building, building 1 to permit existing building side yard setback of 2.7 feet.**

**Variance 2 – from the minimum building side yard setback requirement of 15 feet for the multi-family building, building 2 to permit an existing building side yard setback of 3.1 feet.**

**Variance 3 – from the minimum building rear yard set back requirement of 25 feet applicable to building 2 for a multi-family building to permit an existing building rear setback of .8 feet.**

**Mr. Athey seconded the motion. The motion was unanimously approved.**

Mr. Tucker reported the area is currently zoned residential. The applicant would be making the property more conforming.

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Mr. Ziegler testified to taking measurements of building heights for buildings 1 and 2. Building 1 was slightly less than 24 feet and building 2 is a little less than 14 feet. He has reviewed the mortgage survey prepared by Carmen Casper dated 9/23/05 as it relates to existing footprints on the site. The distance of building 1 from the property line to the south is 2.7 feet; the Code requires 15 feet.

He further testified that on building 2, the physical set back of the property line to the north is 3.1 feet, based on the building height of 15 feet. To the rear of building 2 the existing setback to the rear property line is 0.8 feet and the required setback is 25 feet. This is not based on height.

Mr. Ziegler further testified the character of the area is a mix of residential and commercial. He does not believe there would be any adverse impact on neighbors. His opinion is that neighbors would consider the variances to be an improvement. There is greater opposition to industrial or commercial versus residential.

The matter of parking was discussed. Mr. Cochran owns the connecting property to the north and parking is available there. The Code states two parking spaces per unit are needed and you can offer parking within walking distance. Mr. Ziegler estimated approximately 13-14 cars can park in the lot to the north. Mr. Tucker suggested if Mr. Cochran cannot meet the parking standard certificates of occupancy would be denied by the Building Official and then Mr. Cochran would need to return to this Board for further relief.

Mr. Athey wondered if the applicant were to sell the property would a condition be in order to ensure the conditions continue. Mr. Losco said the Board has the ability to condition the granting of the variance. Mr. Tucker suggested another option would be to require a cross access road so any new owner would have to maintain parking. The applicant does not favor the idea of a cross access easement.

Mr. Cochran testified there are 3 parking spots on the east and west side of building 1 that is inside the property line. The frame building that was behind building 1 no longer exists resulting in a change to the rear yard setback. The building is approximately 22 feet off the property line and Mr. Tucker is requesting a 6 foot variance off the 25 feet required or 19 feet.

*(Mr. Cochran was sworn in by Mr. Losco.)*

Mr. Losco asked Mr. Cochran if additional parking is available where the frame building used to be or if the applicant could use that as a cross access easement. Mr. Cochran said there is parking available and it can be used for a cross access road. He commissioned the survey dated 9/23/05 from Carmine Casper when he bought the property.

Mayor Reese inquired how the area got its current zoning. Jeff Bergstrom said the current uses on this property pre-date the modern zoning code.

No variances are being sought for building 3 because the use is not changing; it is a legal non conformity. Mr. Athey revisited his belief that setbacks go with the parcels rather than Board of Adjustment Hearing – John W. Cochran  
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buildings. Mr. Tucker is satisfied with not requesting a variance. Mr. Losco does not agree that changing one aspect of the use automatically discards all non conformities making variances necessary for everything. He is unaware of any Delaware case law that supports same.

Mayor Reese asked if units will be on the first and second floor of building 1. Mr. Cochran confirmed. There will be two bedrooms in both units in building 1. There will be one bedroom in the units in building 2.

Mr. Tucker addressed Section 230-57C(3) of the Code as it relates to the application. Variances proposed are sought due to special circumstances peculiar to the land – under the Code if the applicant were to knock down a portion of these buildings he would come into compliance but would need to knock down or demolish parts of the buildings as part as existing non-conforming for residential uses. The idea of Mr. Cochran having to knock down a portion of the buildings or in whole to reach conformity is a hardship and is unique to the land. To seek a variance for something that already exists and everyone has lived with for a long period of time supports this argument.

The right to establish residential use currently enjoyed in other similar residentially zoned districts is denied to the current land owner -- unless the applicant demolishes and rebuilds significant sections of the existing non-conforming buildings, which would be unreasonable under the circumstances.

The existing non-conforming building side yard and rear yard setbacks were established prior to the current owner's purchase of the property.

The granting of the variances will not confer upon the property owner special rights as other residentially zoning properties may establish similar residential uses without being required to demolish and rebuild existing buildings at significant expense.

Granting of the variances will not give Mr. Cochran any special rights that other property owners in similar situations could not seek. The applicant is seeking the variances to make the site more conforming.

In conclusion, the character and nature of the zone, whether any substantial adverse impact will come to neighboring property owners if the variances are granted, and will any practical difficulties or hardship be incurred by the property owner if he had to knock down part of the buildings to establish an otherwise legally conforming use in a residential zone. He argued that this proposal pertains to a property that is zoned residential and the applicant is seeking to improve it as residential, which makes it a reasonable use and expansion of the property. The applicant is giving up commercial square footage and taking a non-conformity and turning it into a more conforming use.

The size of the variances are greater than average but the buildings already exist. Nothing is changing from the status quo, translating to a minimal variance.

Mr. Tucker believes that QuikCheck standards have been met as set forth in the Code.

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Mayor Reese inquired whether Mr. Cochran would be interested in purchasing the vacant lot (Turner) between his property and the railroad. There is an old driveway there that nearby apartments use.

Mr. Cochran prefers no conditions on the variances. Mr. Tucker suggested the applicant is not seeking a parking variance, but the Building Official could address any parking issues that arise under new ownership. Mr. Athey is looking to protect residents and safeguard that parking is available going forward. Mr. Cochran stated he has two separate mortgages and expressed concern that a conditional variance would tie up both properties if he wanted to sell one of the properties. He would be agreeable to finding substitute parking within walking distance to provide additional parking spaces should he sell the property. He said he recently purchased another property within walking distance that could be used for parking.

If the Board requires parking in the rear of building 1, Mr. Losco asked where the business vehicles would park. Mr. Cochran said that work vehicles are at the business a short time in the morning and afternoon and employees take them home after hours. Mr. Losco is uncomfortable with the lack of adequate parking in a densely-built property (one-quarter acre lot with 8 units proposed plus a commercial use).

There was discussion about the number of new parking places onsite or within walking distance. It is Mr. Tucker's position is that a condition can be put on variance approval that Mr. Bergstrom would need to be satisfied there are 8 new spaces available and maintained for residential use and would be a code enforcement issue that Mr. Cochran would have to honor. This mechanism is already in the Code as a code enforcement issue. Mr. Athey said that is the same decision this Board is discussing and puts an added burden on Mr. Bergstrom.

Article V, Section 230-28, B(1) of the Code reads "parking spaces required shall be located on the same lot with the main buildings or within walking distance of the main buildings." There is no reference to proof of ownership.

Mr. Athey suggested a condition that when a building permit application is submitted the applicant needs to demonstrate where parking spaces will be provided. The Code does not address cross access easements to adjacent properties or proof.

No one from the public spoke in favor or against the application.

*(The hearing recessed at 8:15 p.m. and resumed at 9:08 p.m.)*

Mr. Losco is concerned with the parking situation and equally concerned with imposing parking requirement conditions on the variance grant that require City personnel to police violations.

*(Further discussion on the topic followed.)*

Ultimately the Board has the ability to impose conditions on an application seeking discretionary relief.

The subject property is paved and the property next door to be used for parking is partially paved. Mr. Bergstrom said that currently there is overflow parking from a non-conforming use under a residential property. He suggested making a parking lot with delineated parking and get off-street parking across the street for his business vehicles. For 809 Washington Avenue, Mr. Losco believes the applicant should provide 8 parking spaces, delineated, via cross access agreement that can't be altered or terminated without Board of Adjustment approval or provide 8 alternative parking spaces within a two block radius. An added stipulation for flexibility would be to require a long-term lease with a provision that the City is notified if the lease is terminated. This way the applicant has the right to sell either parcel since he has separate mortgages, but the buyer of either parcel takes with it with the right of parking on the adjacent property or the burden of receiving parking from the other side. If that is not suitable they can return to this Board with an alternative plan.

The Board's concern is the City would not be notified that there has been lost parking, whether voluntary or involuntary, and the first notice of a problem is through complaints. Enforcement will also be a problem for the City if a violation of the condition does occur.

Mr. Bergstrom believes the problem is easy to fix at this time with a cross access easement which would clean up Mr. Cochran's non-conformity.

Lengthy discussion about a continuance was considered until a more seasoned plan for off-site parking is provided. Mr. Tucker would entertain a continuance, but noted it is clear that Mr. Cochran is comfortable with providing substitute parking if and when he sells his property. He is fine meeting the present Code and being policed by this Board or the Building Official. If the Code were to change Mr. Cochran would then be subject to the Code change.

**A motion was made by Mr. Losco to approve the three variance requests on the amended application subject to the condition the applicant provide 8 off-street parking spaces at 809 Washington Avenue via recorded cross access easement that would be reasonably acceptable to the City Solicitor in form and substance and would not be subject to amendment or termination without further Board of Adjustment approval or that Mr. Cochran would provide other permanent, alternative 8 off-street parking spaces within a two-block radius of 807 Washington Avenue. Mr. Athey seconded the motion.**

If the applicant is good with the arrangement for 809 Washington Avenue but wants the long-term flexibility of situation change so he could sell a parcel without problems and if that is the case he can return to the Board of Adjustment with an alternative plan.

The question was raised that if the applicant returns and provides alternative parking within two blocks to the new Board, that the Board must approve it. The applicant's concern is that another Board could rule differently. Messrs. Losco and Athey do not believe a new Board should be locked in to approval because circumstances could change.

Mr. Losco withdrew his motion.

**Mr. Losco amended his motion to read that the application for 3 variance requests on the amended application be approved subject to the condition the applicant provide 2 off-street parking spaces per unit on 809 Washington Avenue, via recorded cross access easement, be reasonably acceptable to the City Solicitor in form and substance, and would not be subject to amendment or termination without further Board of Adjustment approval. Mr. Athey seconded the motion which was approved unanimously.**

The hearing was adjourned at 9:40 p.m.

Respectfully submitted,

Debbie Turner  
Stenographer